

HR Committee

22nd September 2016



Report of: Service Director HR & Workplace

Title: Protected officers investigation & disciplinary process

Ward: N/A

Officer Presenting Report: Richard Billingham

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Recommendation

That the Committee recommends to the Full Council that the Council's Constitution be amended to:

1. Provide for a Protected Officers Panel comprising 3 suitably-trained members (one of whom must be a member of the Executive but must not be responsible for the services under the direction of the protected officer(s) involved) and 2 Independent Persons appointed under the Localism Act 2011.
2. Include terms of reference for the Panel as attached at Appendix A.
3. Adjust terms of reference for the Full Council, the Appeals Committee and the Human Resources Committee as attached at Appendix B.
4. Update the Officer Employment Procedure Rules in light of the proposals contained within this report.

That the Committee notes that the Council's Disciplinary Procedure for First and Second Tier Officers will be amended in light of the above and brought forward for approval at the Committee's next meeting.

Summary

This report proposes how the Council should implement the requirements of the Local Authorities (Standing Orders) (England) (Amendment) Regulations 2015.



The significant issues in the report are:

- Statutory disciplinary and dismissal procedures apply to local authorities' heads of paid service, monitoring officers and chief finance (section 151) officers (the "protected officers").
- A new process has replaced the previous Designated Independent Person (DIP) process.
- The new process applies to dismissals for any reason "other than redundancy, permanent ill-health or infirmity of mind or body, but does not include failure to renew a contract of employment for a fixed term unless the authority has undertaken to renew such a contract". However, unlike the DIP process, it does not apply to disciplinary action short of dismissal.
- A protected officer cannot, in most cases, be dismissed unless the dismissal has been approved by the Full Council by way of a vote.
- The legislation makes provision for a panel of at least 2 independent persons, which can advise the authority on the proposed dismissal.
- The regulations do not however provide much if any detail on how the new process will work in practice, including the setting up of the panel, and ensuring a fair investigation takes place prior to dismissal.
- Initial changes to the Officer Employment Procedure Rules (part of the Council's Constitution) were made at last year's annual council meeting in order to meet the tight timelines imposed by the legislation, but further refinement is needed in order to ensure full compliance.
- This matter has been considered by the HR Committee on two previous occasions. This final report incorporates the direction given at the Committee's previous meeting not to incorporate the guidance provided by the Joint Negotiating Committee for Local Authority Chief Executives with regard to the composition of the Protected Officers Panel. This report also clarifies that in relation to the dismissal of a protected officer, the appeal is in fact the Full Council hearing (the decision to dismiss having been taken by the Protected Officers Panel). For action short of dismissal, the decision would be taken by the Protected Officers Panel and the protected officer would have the right of appeal to the Appeals Committee.

Policy

1. The Council's approach to disciplinary action and dismissal of its protected officers is set out in the Officer Employment Procedure Rules (OER), which forms Part 4(F) of the Council's Constitution.

Consultation

2. **Internal**
Legal Services, whose advice has been fully incorporated into the proposals and the contents of this report.
3. **External**
Local Government Association, whose advice has been incorporated into the proposals as appropriate.

Context

4. The Local Authorities (Standing Orders) (England) (Amendment) Regulations 2015 (the Regulations) came into force in May 2015 and brought in a new disciplinary/dismissal procedure for local authorities' heads of paid service, monitoring officers and chief financial (section 151)

officers.

5. The Regulations removed the statutory requirement for the appointment of a Designated Independent Person (DIP), and introduced new rules which require any decision to dismiss a protected officer to be taken by the Full Council after consideration of:
 - 5.1. Any advice, views or recommendations from a Panel containing at least 2 Independent Members appointed under the Localism Act 2011
 - 5.2. The conclusions of any investigation into the proposed dismissal; and
 - 5.3. Any representations from the officer concerned.
6. The new process applies to dismissals for any reason other than redundancy or permanent ill-health, but does not include failure to renew a contract of employment for a fixed term (unless the authority has undertaken to renew the contract). However, unlike the DIP process, it does not apply to disciplinary action short of dismissal.
7. Unfortunately the Regulations provide little detail of how the new process will operate in practice and so this report suggests an appropriate procedure in line with initial advice/guidance from the Local Government Association.
8. Where an allegation is made against a protected officer(s), it is proposed that the Chair of the HR Committee may, following consultation with the Mayor and having taken legal and HR advice, refer the matter to the Protected Officers Panel and may approve the suspension of the protected officer(s) for an interim period as a precautionary measure.
9. The Protected Officers Panel would have responsibility to:
 - 9.1. Review the allegation(s) and any evidence to decide if the matter should be investigated and if the protected officer(s) should be suspended (or remain suspended)
 - 9.2. If necessary, commission a suitably-qualified person(s) to undertake an investigation.
 - 9.3. Review the findings of the investigation and if there is a case to answer decide what disciplinary action, if any, is appropriate, after hearing the views of the protected officer(s) concerned.
 - 9.4. For action short of dismissal, ensure that those measures are put in place.
 - 9.5. Where dismissal is the decision, refer that to the Full Council.
 - 9.6. Notify the executive of the proposed dismissal(s) and seek any material or well-founded objective to the dismissal(s) prior to the Full Council meeting.
 - 9.7. If the Full Council confirms the dismissal, issue the notice of dismissal to the protected officer(s).
10. Draft terms of reference for the Panel are attached at Appendix A.
11. Although the Regulations appear to suggest that the Panel needs only be made up of two Independent Persons appointed under section 28(7) of the Localism Act 2011, because the Panel falls into the category of a committee appointed by the authority under section 102(4) of the Local Government Act 1972, the normal proportionality rules apply. This means that in addition to the two or more Independent Persons, the Panel would need to include local authority

elected members (including a member of the executive). The current arrangement for other Chief Officer disciplinary hearings is a politically-balanced panel of three suitably-trained members (one of whom must be an executive member), and it is suggested that this formula is adopted for the Panel. At its previous meeting the HR Committee recommended that the member of the Executive who has responsibility for the services under the direction of the protected officer(s) should not be eligible to sit on the Panel.

- 12.** The Council appointed an Independent Person (Christopher Eskill) in September 2013 for a four year team under Section 28 of the Localism Act 2011 (which concerns the member code of conduct regime). Where fewer than two Independent Persons are in place or available to act then an Independent Person appointed by another authority under the 2011 Act may sit on the Panel. It is proposed that at least two suitably qualified Independent Persons be appointed in 2017.
- 13.** The authority must ensure that Panel is appointed at least 20 working days before the Full Council meeting at which the authority decides whether or not to approve a proposal to dismiss a protected officer.
- 14.** Although the decision to dismiss would not formally be taken by the Panel (since the Full Council must make the final decision) the intention would be for the Panel meeting to follow the format of a standard disciplinary hearing, at which the question of dismissal was in issue. The protected officer would be invited to attend the Panel meeting to put forward their views, and it would be treated as one at which the officer has the statutory right to be accompanied by a fellow worker, trade union official or a representative from a professional body or legal representative.
- 15.** If the Panel recommends action short of dismissal then it will ensure the relevant action(s) are taken, without referring the matter to the Full Council. The Regulations do not provide for a right of appeal from the Panel decision, but to bring matters in line with the procedures for other officers and in the interests of natural justice, it is suggested that the Appeals Committee should hear any appeal and the terms of reference amended accordingly. Appendix B sets out the proposed amendment.
- 16.** If the Panel recommends dismissal, then it will formally advise the Full Council of its recommendation for a final decision to be made.
- 17.** The Full Council hearing would be held in closed/exempt session and would not be webcast. In essence it would be the appeal hearing because the decision to dismiss would have been taken by the Protected Officer Panel and there is no higher body within the authority than the Full Council itself. Strictly speaking, this is not in line with standard employment law practices, but bearing in mind the Regulations' requirements, an employment tribunal may find that such an approach is fair, given that the officer will have had the opportunity to state their case before any proposal to dismiss is made, and then to address the authority before any decision to approve the dismissal is made.
- 18.** The Regulations do not specifically give the protected officer the right to make representations at the Full Council meeting. However, because of the importance of the meeting, the LGA guidance recommends that the officer should be provided with the appropriate paperwork in advance of the meeting and be allowed to make written representations as well as invited to

attend the meeting to make representations. The statutory right to be accompanied should also be applied.

19. The new procedure does not remove the requirement on authorities to follow the Executive Objections Procedure. In summary, members of the executive must be notified of the name of the person to be dismissed and the relevant particulars and have the opportunity to raise objections through the Mayor. If there are no objections or an objection is not “material or well founded” then the dismissal may proceed.
20. In some authorities, the DIP processes are incorporated into chief officers’ terms and conditions. However, this is not the case for the Council because the Disciplinary Policy for First and Second Tier Officers is not contractual. This Policy states that the Chief Executive will be subject to the model disciplinary procedure within the Joint Negotiating Committee for Chief Executives of Local Authorities Conditions of Service Handbook. However, paragraph 15.16 of the Handbook states “where informal resolution is not possible the model procedures should apply unless alternative arrangements have been agreed locally” – and the new process could be argued to be locally-agreed alternative arrangements. This Policy will be updated and brought for approval at the Committee’s next meeting.

Proposal

21. As identified under Recommendations above.

Other Options Considered

22. That the Panel should comprise Independent Persons only, as stated in guidance from the JNC for Chief Executives. This was not the preference of the Committee at its previous meeting.

Risk Assessment

23. These changes are required by law.

Public Sector Equality Duties

- 24a) Before making a decision, section 149 Equality Act 2010 requires that each decision-maker considers the need to promote equality for persons with the following “protected characteristics”: age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex, sexual orientation. Each decision-maker must, therefore, have due regard to the need to:
 - i) Eliminate discrimination, harassment, victimisation and any other conduct prohibited under the Equality Act 2010.
 - ii) Advance equality of opportunity between persons who share a relevant protected characteristic and those who do not share it. This involves having due regard, in particular, to the need to --
 - remove or minimise disadvantage suffered by persons who share a relevant protected characteristic;

- take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of people who do not share it (in relation to disabled people, this includes, in particular, steps to take account of disabled persons' disabilities);
 - encourage persons who share a protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.
- iii) Foster good relations between persons who share a relevant protected characteristic and those who do not share it. This involves having due regard, in particular, to the need to –
- tackle prejudice; and
 - promote understanding.

24b) No equality impact assessment has been undertaken because these changes are required by law.

Legal and Resource Implications

Legal

The Local Authorities (Standing Orders) (England) (Amendment) Regulations 2015 came into force in May 2015 and introduced a new procedure for the disciplining and potential dismissal of the Head of Paid Service, Monitoring Officer and S151 Officer. The process now requires the Council to establish a Panel which must include at least two Independent Persons, appointed under section 28(7) of the Localism Act 2011 (which relates to the procedure for the investigation of complaints under the member code of conduct regime) and provides that any decision to dismiss must be made by the Full Council. The report sets out the requirements of the new process in detail and is in accordance with the legal requirements now in place for these Officers.

(Advice provided by Caroline Elwood, Interim Service Manager Legal (Place))

Financial

(a) Revenue

The report introduces a new Protected Officers Panel to consist of 3 suitably trained members and 2 independent persons appointed under the Localism Act 2011. In the event that the Protected Officers Panel is required to meet, there will be some minimal costs required for payments to the independent persons (currently estimated at c£3k). However, these costs are not ongoing annual revenue costs and would only be incurred in the event that the panel is required to convene. In this event, the costs would be met from within existing budget provision.

Advice given by: Janet Ditte: Service Manager, Finance Business Support
Date: 14th Sept 2016

(b) Capital

Not applicable.

Land

Not applicable.

Personnel

The Council's Protected Officer roles are current covered by interim managers. When appointed, new jobholders will be made aware of the arrangements covered in this report.

Appendices:

A – Draft terms of reference for the Protected Officer Panel

B – Draft amendments to terms of reference for the Full Council, Appeals Committee and HR Committee

LOCAL GOVERNMENT (ACCESS TO INFORMATION) ACT 1985**Background Papers:**

None.